UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BONANZA VENTURES, LLC
d/b/a SPORT CLIPS[1]

Case 16–CA–274926

and

MEGAN WEISINGER, an Individual

Becky Mata, Esq., for the General Counsel.

Randal Bays, Esq. and *Katherine Grosskopf, Esq.,*
(The Bays Firm), of Conroe, Texas
for the Respondent.

Suzanne Lehman-Johnson, Esq., of Houston,
Texas for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. This case principally presents the question of whether Respondent Bonanza Ventures LLC d/b/a Sport Clips discharged Charging Party and hair stylist Megan Weisinger for her protected concerted activity. It also presents a number of subsidiary issues, including whether the Respondent is subject to the Board's jurisdiction; whether the General Counsel should be permitted to make multiple amendments to the complaint; and whether it is appropriate to find protected concerted activity that is not pled in the complaint. As to the discharge, the General Counsel's complaint alleges that Weisinger engaged in protected concerted activity only on January 27, 2021. On that date, Weisinger discussed with a customer that the Respondent had disciplined her for getting into a shouting match with her supervisor over a lack of breaks. A different customer overheard the discussion, took exception to certain statements which Weisinger alleged the Respondent's supervisors had made, and left the salon without completing his scheduled services. On that

[1] The Respondent's name has been changed to reflect the correct doing-business-as name of Bonanza Ventures, LLC. (GC Exh. 13.)

same date, Weisinger also told her coworkers about being disciplined. The Respondent discharged Weisinger the next day. The General Counsel's complaint alleges that Weisinger's discharge violated Section 8(a)(1) of the National Labor Relations Act because it was due to her protected concerted activity on January 27. I conclude that Weisinger's discussion with her customer was not protected concerted activity but rather individual griping. Weisinger spoke of her own complaints but never stated to the customer that her coworkers shared her concern over a lack of breaks or her discipline. She also never sought to enlist his support to address either issue. I further find that Weisinger's discussions with her coworkers regarding her discipline were not protected concerted activity, because no individual or group action to protest the discipline or address breaks with management was suggested. Finally, although Weisinger did engage in other, unalleged protected and inherently concerted activity during different conversations with her coworkers that same month, the Respondent had no knowledge of that conduct. Accordingly, the Respondent's discharge of Weisinger was lawful.[2]

From January 24 through 27, 2022, I heard this case via videoconferencing. On March 23, 2022, the General Counsel and the Respondent filed posthearing briefs, which I have read and carefully considered. On the entire record, I make the following findings of fact and conclusions of law.[3]

FINDINGS OF FACT

The Respondent is a Texas limited liability company which is engaged in the business of providing haircuts and styling services to the public. In particular, the Respondent operates three franchised Sport Clips locations in Houston/Meyerland, Montgomery, and Willis, Texas. All three locations are included under its corporate umbrella.

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[2] On July 22, 2021, the General Counsel, through the Regional Director for Region 16 of the National Labor Relations Board (the Board), issued a complaint against Bonanza Ventures LLC d/b/a Sport Clips (the Respondent) in Case 16–CA–274926. The complaint was premised upon an unfair labor practice charge filed by Megan Weisinger on March 30, 2021. The complaint alleged that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Weisinger on January 28, 2021, due to protected concerted activity she engaged in on January 27, 2021. On August 5, 2021, the Respondent filed an answer to the complaint, denying the substantive allegations. On December 28, 2021, the General Counsel amended the complaint to include additional remedies being sought for the alleged unfair labor practice. On January 11, 2022, the Respondent filed an answer to the first amended complaint, denying that the remedies being sought were appropriate.

[3] In order to aid review, I have included citations to the record in my findings of fact. The citations are not necessarily exclusive or exhaustive. In assessing witnesses' credibility, I have considered their demeanors, the context of the testimony, the quality of their recollections, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Where needed, I discuss specific credibility determinations in my findings of fact.

I. THE GENERAL COUNSEL'S MOTION TO AMEND THE COMPLAINT'S ALLEGATIONS ON JURISDICTION

Prior to discussing the substantive allegations, multiple preliminary matters must be addressed. First, in its answers to the original and first amended complaint, the Respondent admitted that it was a Section 2(2) employer. However, the Respondent denied that the Board had jurisdiction over it, asserting its operations did not affect commerce within the meaning of Section 2(6) and (7). On January 26, 2022 (the third day of the hearing), prior to resting the case in chief, the General Counsel moved to amend the complaint a second time, this time to alter the jurisdictional allegations. I granted the motion over the Respondent's objection that the amendment was not timely.[4] I reaffirm that holding here.

Section 102.17 of the Board's Rules and Regulations authorizes an administrative law judge to grant a motion to amend a complaint during the hearing "upon such terms as may be deemed just." This provision allows the judge "wide discretion" to grant or deny a motion to amend. *Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 549 fn. 8 (2015); *Bruce Packing Co.*, 357 NLRB 1084, 1085 (2011). In exercising that discretion, the judge should consider:

> (1) whether there was surprise or lack of notice; (2) whether there was a valid excuse for the delay in moving to amend; and (3) whether the matter was fully litigated. *Stagehands Referral Service, LLC*, 347 NLRB 1167, 1171–1172 (2006).

Before addressing those factors, setting forth the sequence of events leading up to the General Counsel's motion will be helpful. On May 6, 2021, during the investigation of the underlying unfair labor practice charge, the Respondent submitted a commerce questionnaire completed by Cody Lovins, its president.[5] The questionnaire responses indicated that the Respondent met the Board's jurisdictional standards. This included that the Respondent's annual gross revenue was $1,000,000 and its gross revenue from the sale of services to customers outside the State of Texas exceeded $50,000. The questionnaire also referenced only the Montgomery location, where Charging Party Weisinger was employed. Accordingly, when the original complaint issued on July 22, 2021, it alleged that the Board had jurisdiction based on those facts involving the Montgomery location. The General Counsel learned for the first time that the Respondent was contesting jurisdiction when, on August 5, 2021, the company denied the jurisdictional allegations in its answer to the original complaint. The answer contained blanket denials of the allegations without further explanation. The hearing in this case originally was set for October 5, 2021, but, on September 16, 2021, the Regional Director granted Weisinger's unopposed motion to postpone the hearing. The Regional Director rescheduled the hearing to January 24, 2022. Then on December 13, 2021, the Respondent filed a second commerce questionnaire with different responses which indicated the Board's jurisdictional standards were not met by the Montgomery location.[6] Finally, during a conference call roughly 2 ½ weeks prior to the hearing with me and the parties' attorneys, the

[4] Tr. 339–350.

[5] Jt. Exh. 1.

[6] Jt. Exh. 2.

Respondent explained its theory that the Board's jurisdictional standards were not met when evaluating the single location—Montgomery—where Weisinger worked. The General Counsel asserted, in contrast to the complaint allegations, that the three locations under the Respondent's corporate umbrella should be utilized to evaluate the jurisdictional standards. I told counsel that the matter would have to be litigated then.

In light of this sequence of events, all three factors support granting the General Counsel's motion to amend the complaint. First, no surprise or lack of notice occurred here, as the disputed issue was raised during the conference call about 2 ½ weeks prior to the start of the hearing. The General Counsel explicitly stated that jurisdiction would be established by combining the numbers of the three stores. The General Counsel reiterated this theory in her opening statement. Although she did not explicitly move to amend the complaint until the third day of hearing, the original and first amended complaints alleged that jurisdiction was established solely by the Montgomery store. Thus, it was obvious to the Respondent, or should have been, that an amendment to the complaint would be forthcoming to allege the new theory.

Second, the General Counsel had a valid excuse for not moving to amend the complaint until day 3 of the hearing. The General Counsel did not become aware of the Respondent's position that it did not meet the Board's jurisdictional standards until the company filed its answer to the original complaint on August 5, 2021. Although the Respondent argues that an amendment sought more than 6 months later is untimely, the timing of the company's revelation of its defense belies that contention. Having already issued the complaint, the General Counsel could not, under the Board's rules, subpoena documentation from the Respondent to immediately investigate jurisdiction. Instead, the General Counsel properly subpoenaed that information for production at the start of the hearing. That start was delayed due to the unopposed motion from Weisinger, contributing to the amendment delay. The Respondent produced documents concerning jurisdiction on both the first and second day of the hearing. The General Counsel moved to amend the complaint after the complete production and review of those documents. That occurred on the very next hearing day and prior to the General Counsel resting her case in chief.

Finally, the jurisdiction issue was fully litigated. As the record makes clear, both sides had the opportunity to present any available evidence concerning jurisdiction. The Respondent conducted an extensive examination of Cody Lovins on that issue and the General Counsel had an ample opportunity to cross examine him. The Respondent also did not request, and thus was not denied, an extension of time to adduce additional evidence on jurisdiction. Thus, no basis exists for finding the Respondent was prejudiced by the amendment.

Accordingly, I reaffirm my granting of the General Counsel's motion to amend the complaint's allegations concerning jurisdiction. See *Rogan Bros. Sanitation*, supra (complaint amendment was proper when made during the hearing before the General Counsel completed the case in chief and where it was fully litigated); *Remington Lodging & Hospitality, LLC*, 363 NLRB 987, 987 fn. 1 (2015) (complaint amendment properly granted where it was based upon a

document the General Counsel first received mid-hearing in response to a subpoena and the respondent had an opportunity to present evidence for its defense).

II. THE GENERAL COUNSEL'S MOTION TO AMEND THE COMPLAINT TO INCLUDE AN UNLAWFUL HANDBOOK RULE ALLEGATION

At the start of the hearing, the General Counsel also advised me that she would move to amend the complaint to include an allegation that the Respondent violated Section 8(a)(1) by maintaining, at the time of the material events in this case, a handbook rule entitled "Confidentiality."[7] The rule contained a provision which prohibited employees from disclosing "pay rates" to non-employees. It also required employees to refer any request for that information to management and subjected them to potential discipline for noncompliance. At that time, the General Counsel represented that the Region had not become aware of the rule's potential involvement in this case until just prior to the start of the hearing. I indicated I would grant the motion and give the Respondent any additional time it needed to prepare a defense. However, I did not actually grant the motion, because a written amendment to the complaint had not yet been prepared. The General Counsel renewed the motion at the close of her case in chief.[8] She also disclosed that the Region actually had received a copy of the Respondent's full handbook on May 7, 2021, during its investigation of Weisinger's unfair labor practice charge. I deferred ruling on the motion. At the close of the hearing, I denied the motion.[9]

I reaffirm that holding here, due to the General Counsel's lack of a valid excuse for the lengthy delay in moving to amend the complaint. The Region did not issue the complaint in this case until July 22, 2021, or 2 ½ months after receiving the handbook. The hearing in this case did not begin until January 24, 2022, some 6 months later. Having received the handbook during the investigation, the Region had an obligation to exercise due diligence and review it, either during the investigation or trial preparation. Instead, the Region did not review the handbook until the Respondent filed a pre-trial brief the day before the hearing.[10] No excuse

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[7] Tr. 8–11; GC Exh. 15, pp. 18–19 of handbook.

[8] Tr. 339–350.

[9] Tr. 604–613.

[10] After 9:00 p.m. on the day before the hearing, the Respondent filed a brief arguing that the General Counsel was precluded from litigating the lawfulness of Weisinger's discharge in a Board proceeding, because the Texas Workforce Commission, a state agency, already issued a decision finding her discharge lawful and denying her unemployment compensation. The Respondent did not state in any pre-trial conference call that it intended to file such a brief. Given the timing of its filing and the lack of notice, I advised counsel that I had not read the brief, because neither the General Counsel nor the Charging Party had an opportunity to respond to it. (Tr. 346.) In any event, the Respondent's position in the brief is incorrect as a matter of Board law, as we discussed at the hearing when I admitted, over objection, the commission's decision. (Tr. 121–126.) In Board proceedings, unemployment compensation decisions are relevant and admissible, but any findings are not controlling. *Cardiovascular Consultants of Nevada*, 323 NLRB 67, 67 fn. 2 (1997). Moreover, even if Texas law renders unemployment compensation decisions confidential, the decisions remain admissible in Board proceedings. *North Carolina License Plate Agency #18*, 346 NLRB 293, 294 fn. 5 (2006).

was provided as to why the Region did not review the handbook until then. Under these particular circumstances, I conclude that the inexcusable delay is sufficient, standing alone, to warrant denying the motion to amend. *King Soopers, Inc. v. NLRB*, 859 F.3d 23, 33–34 (D.C. Cir. 2017) (General Counsel's mid-trial motion to amend the complaint was too late because all of the information needed to investigate the charge was available to the GC for a full year before the hearing and no valid excuse existed for not including the allegation in the original complaint.) See also *Interstate Management Co.*, 369 NLRB No. 84, slip op. at 10–11 (2020) (motion to amend complaint denied based, in part, on the General Counsel's lack of explanation for a delay of just one month to file the motion after learning of potential violation).

III. JURISDICTION

The parties agree that the Board's retail jurisdiction standard applies in this case. The General Counsel's second amended complaint alleges that, in conducting its business operations at the three locations combined in calendar year 2020 and/or 2021, the Respondent derived gross revenues in excess of $500,000 (discretionary jurisdiction). The complaint further alleges that, from April 30, 2020, to March 16, 2021, the Respondent received loans from the federal government in excess of $500,000 which were forgiven without repayment. Finally, the complaint alleges that, in conducting its operations during the same time periods, the Respondent purchased and received, at the three locations combined, products, goods, and materials valued in excess of $5,000 directly from points outside the State of Texas (statutory jurisdiction). In its answer to the second amended complaint, the Respondent denied that the discretionary and statutory jurisdiction minimums have been met. In particular, the Respondent argues jurisdiction should be determined based solely on the revenues and purchases for the Montgomery Sport Clips location. The Respondent also denied that its loan proceeds from the federal government constituted revenue.

If its discretionary and statutory standards are met, the Board will assert jurisdiction over a retail enterprise. *A-W Washington Service Station, Inc.*, 258 NLRB 164, 168 (1981). The discretionary retail standard is an annual gross volume of business of at least $500,000. *Carolina Supplies and Cement Co.*, 122 NLRB 88 (1958). The statutory retail standard requires that an employer have an annual direct or indirect outflow or inflow greater than de minimis. *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. at 9–10 (2021). The Board's jurisdictional criteria do not literally require evidentiary data respecting any certain 12-month period of operation. *Reliable Roofing Co.*, 246 NLRB 716, 716 fn. 1 (1979) (citing *United Mine Workers of America, District 2 (Mercury Mining and Construction Corporation)*, 96 NLRB 1389, 1390–1391 (1951)). Rather, the 12-month period for asserting jurisdiction may be the most recent calendar or fiscal year preceding the unfair labor practice, or the 12-month period immediately preceding the hearing before the Board. *SAG-AFTRA New York*, 370 NLRB No. 14, slip op. at 2 (2020). The burden to establish Board jurisdiction rests on the General Counsel. *Laborers Local 1177 (Qualicare-Walsh, Inc.)*, 269 NLRB 746, 746 (1984).

The first order of business is to determine which 12-month period should be used to evaluate whether the Respondent meets the standards for retail jurisdiction. Here, the

Respondent discharged Weisinger on January 28, 2021. The General Counsel's second amended complaint alleges that jurisdiction was met in both calendar years 2020 and 2021. However, only calendar year 2020 is proper to utilize, because that is the calendar year preceding the Respondent's discharge of Weisinger. The 12-month period preceding the hearing runs from January 24, 2021, to January 23, 2022, not calendar year 2021, and the parties presented no evidence for 2022. Thus, calendar year 2020 is the proper time period to evaluate jurisdiction.

As to discretionary jurisdiction, the Houston/Meyerland, Montgomery, and Willis stores had a combined gross revenue of $960,752 in calendar year 2020.[11] Thus, the discretionary retail standard has been met.[12]

Without citation to any authority, the Respondent argues that the discretionary retail standard has not been met because the gross revenue for the Montgomery Sport Clips location in calendar year 2021 was $390,810.80. Leaving aside that calendar year 2021 is not a proper 12-month period to use, the contention that the discretionary retail standard evaluation should be based solely upon the Montgomery location can be dispensed with in short order. When the Board first implemented the $500,000 gross volume of business standard for retail enterprises in 1958 in *Carolina Supplies and Cement*, supra, it stated:

> The Board will apply this standard to the total operations of an enterprise whether it consists of one or more establishments or locations and whether it operates in one or more States.

Since that time, the Board has combined the gross revenues of multiple locations operated by the same respondent to conclude that the discretionary retail standard has been met. See, e.g., *A-W Washington Service Station, Inc.*, supra (respondent operated two gasoline stations in the same state whose combined revenue exceeded $500,000); *Dominick's Finer Foods, Inc.*, 156 NLRB 14, 15 (1965) (respondent operated 10 grocery stores in the Chicago area and their combined revenues exceeded $500,000).[13] See also *HDC, Inc.*, 218 NLRB 316 (1975) (Board noting that it is

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[11] Tr. 198–199, 284. This combined gross revenue figure was reported on a 2020 tax return for Bonanza Ventures, LLC (GC Exh. 9).

[12] For calendar year 2020, the gross revenue for the Houston/Meyerland location was $264,586 and for Willis it was $264,799, totaling $529,385. (GC Exhs. 22, 23; Tr. 298–299.) Thus, those two locations alone are sufficient to meet the discretionary retail jurisdiction requirement. The Montgomery location's gross revenue for calendar year 2020 is not in the record, but can be estimated at $432,367, utilizing the combined revenue for Bonanza Ventures, LLC and the revenue for Houston/Meyerland and Willis.

[13] The citation to the case involving *Dominick's Finer Foods* gives me the opportunity to address a personal matter for the first time in a decision and I ask the reader's indulgence for a moment. My father, Joseph Muhl Jr., was employed in the retail grocery industry for most of his adult life, after serving in the U.S. Army. He spent many of his retail years working at *Dominick's Finer Foods* at various Chicago-area locations. His hard work there and other sacrifices he made helped me to go to college and law school and ultimately to become an administrative law judge. Unfortunately, my father passed away unexpectedly shortly before I became a judge and did not get to experience that fruit of his labor. So I want to acknowledge my father here, in one of my decisions, and thank him for all he did for me.

"customary to consider for jurisdictional purposes the total combined commerce data of all of an employer's operations").[14] As noted above, the combined gross revenue of the three Sport Clips locations under the umbrella of the Bonanza Ventures legal entity is over $500,000 for calendar year 2020. Thus, the Board's discretionary retail jurisdiction standard has been met.

As to statutory jurisdiction, the Respondent purchased and received more than $5,000 of office supplies from Sam's Club, a retail seller of bulk food and other items, in calendar year 2020.[15] In addition, part of the Sport Clips business model is to have sports playing on televisions for customers to view as they are getting their hair cut. At the Houston/Meyerland and Willis stores, the Respondent broadcasts channels using Dish Network, a satellite television provider. In 2020, the Respondent paid more than $1,400 to Dish Network for those services.[16] On multiple occasions prior to 2020, the Board has found that it has jurisdiction over Sam's Club and Dish Network. See, e.g., 366 NLRB No. 119, slip op. at 4 (2018); 363 NLRB 1307, 1313 (2016); 349 NLRB 1007, 1017 (2007); 322 NLRB 8, 11 (1996). The combined purchase of $6,400 in goods and services from companies engaged in interstate commerce is greater than de minimis and establishes the Board's statutory jurisdiction. *Healthy Minds*, supra (statutory jurisdiction established based upon employer's purchases of goods and services totaling $8,700 from ADT Security, Suddenlink, and DirecTV, all companies engaged in interstate commerce); see also *Sommerset Manor, Inc.*, 170 NLRB 1647 (1968) ($1,800 indirect inflow more than de minimis); *Marty Levitt*, 171 NLRB 739 (1968) ($1,500 direct outflow more than de minimis); *Aurora City Lines, Inc.*, 130 NLRB 1137, 1138 (1961), enfd. 299 F.2d 229, 231 (7th Cir. 1962) ($2,000 direct inflow more than de minimis).[17]

The Respondent takes issue with the General Counsel's pleading of statutory jurisdiction in the second amended complaint. The allegation states:

> In conducting its operations during the period of time described above in paragraph 3(a), Respondent purchased and received at its Montgomery, Willis

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[14] *HDC* is an advisory opinion of the Board, a proceeding designed primarily to determine questions as to the applicability of the Board's discretionary jurisdictional standards to an employer's commerce operations. *The Western Pennsylvania School for the Deaf*, 262 NLRB 240, 240–241 (1982).

[15] GC Exh. 17 in Bonanza Ventures, LLC's General Ledger for 2020, entries where "Expense", "Sam's Club", and "Office Supplies" appear in the same line with a specific date in 2020.

[16] GC Exhs. 24, 25.

[17] The record contains additional evidence which could further demonstrate the Respondent's connection to interstate commerce and statutory jurisdiction. However, because the Respondent's purchases from Sam's Club and Dish Network are sufficient to do so, additional findings are unnecessary. I further note that the Board stated in *Carolina Supplies and Cement Co.*, 122 NLRB at 89, that it was adopting the gross volume of business standard for retail because those figures "are readily obtainable and their production places no hardship upon employers." It further noted that the "ascertainment of inflow figures often involves extensive examination of an employer's records in which every purchase must be considered, which is time-consuming both for personnel of the employer involved and the Board."

> and Houston (Meyerland), Texas facilities products, goods, and materials valued in excess of $5,000 directly from points outside the State of Texas.

The Respondent argues that the purchase and receipt of "services" is not alleged therein, yet the General Counsel relies upon such purchases to establish statutory jurisdiction. However, as described above, the Respondent purchased $5,000 of products from Sam's Club that, standing alone, is an amount greater than de minimis.

Finally, I note that the General Counsel's second amended complaint pled that statutory jurisdiction was established by direct inflow, which is not my basis for finding it has been established. Thus, my conclusion is akin to when a judge finds a violation of the Act on a theory different from that in a complaint. In evaluating whether it is appropriate to do so, the Board considers:

> (1) whether the language of the complaint encompasses the legal theory upon which the violation was found; (2) whether the factual record is complete, or, in other words, whether the facts necessary to find a violation under the theory in question were litigated; (3) whether the law is well established; and (4) the General Counsel's representations about the theory of violation, and the differences between the litigated theory and the theory in question. *DirectSAT USA, LLC*, 366 NLRB No. 40, slip op. at 1 (2018).

In this case, the language of the complaint does not encompass my legal theory. However, the parties fully litigated the issue of jurisdiction and presented substantial evidence concerning the Respondent's transactions with companies engaged in interstate commerce. The Board's standard for retail jurisdiction has been settled law since 1958. Finally, although not pled in the complaint, the General Counsel argued in the posthearing brief that statutory jurisdiction was met, in part, by the Respondent's purchases of goods and services from other employer's engaged in interstate commerce.[18] That is the same theory upon which I find statutory jurisdiction was met. The only difference between the complaint's theory and my theory is whether the Respondent is directly purchasing the goods or services from outside the state or from inside the state from companies engaged in interstate commerce. The totality of these circumstances weighs more heavily on the side of finding it appropriate to base statutory jurisdiction upon my theory. *Stein, Inc.*, 369 NLRB No. 10, slip op. at 4 (2020); *Parexel International, LLC* 356 NLRB 516, 517–518 (2011).[19]

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[18] GC Br., pp. 21–22.

[19] The record evidence cited by the General Counsel does not demonstrate sufficient direct inflow during calendar year 2020 to establish statutory jurisdiction. (GC Exhs. 13, 17, 18, 19, 19(a), 24, 24(a), 25, and 25(a).) GC Exh. 13 contains statements from Direct Beauty Supply/CosmoProf for hair salon products purchased by the Respondent, but no evidence establishes that the supplies came from outside the state. GC Exh. 17 is the Respondent's General Ledger for 2020, which, while it listed expenses, did not establish that any of them were for products or services purchased from outside the state. GC Exh. 18

Thus, the General Counsel has met the burden of establishing the Board's jurisdiction, both discretionary and statutory, over the Respondent.[20]

IV. ALLEGED UNFAIR LABOR PRACTICES

The Respondent was formed as a legal entity in 2009. Cody and Veronica Lovins are members of the LLC and also serve as president and secretary, respectively, of the company. In 2017, the Respondent franchised and opened its Montgomery, Texas Sport Clips location. In January 2021, Chrysta Thomas was the director of operations for the Lovins, including for the Montgomery location. She did not work out of that physical location. Barbara Rodriguez[21] was the area manager. Stacy Hall was the manager for the Montgomery store. Christy Nino was a stylist and the assistant manager. The other stylists at the location were Weisinger, Renee Rainey, Maighann Carroll, and Erin Bryce. Weisinger began working at the Montgomery location in November 2017.[22]

The Montgomery location has a salon floor at the front of the store with hair cutting stations. Each salon station is equipped with a television for customers to watch sports. Shampoo bowls are in the middle of the salon and a private breakroom for employees is in the back. The location is open daily from 9 a.m. to 7 p.m. Typically, a total of four employees work each day, two on a shift that starts in the morning and two on a shift that ends in the evening. The salon floor has at least two but not more than four employees on it at one time.[23]

A. The Respondent's Breaks Policy and Code of Conduct

The Respondent's employee handbook contains a break policy requiring employees to receive permission from a manager before they take any lunch or rest break. The policy states that breaks are based on the needs of the business and are not guaranteed. Lunch breaks are 30

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is the Respondent's General Ledger for 2021, which suffers from the same flaw as the 2020 version. It also is for an irrelevant calendar year. GC Exhs. 19 and 19(a) are invoices from WorldPay to the Respondent for 3 months in 2021, an irrelevant time period. Moreover, WorldPay processes credit card transactions in the Respondent's salons. (Tr. 303.) Although the invoices list an Ohio address for WorldPay, the record does not establish how payments are transmitted. In any event, such credit card transactions are insufficient to establish jurisdiction. *Alameda Glass & Mirror Co.*, 218 NLRB 557, 557 fn. 1, 558–559 (1975). Finally, GC Exhs. 24, 24(a), 25, and 25(a) are invoices from Dish Network to the Respondent in both 2020 and 2021. Again, nothing in the record establishes these invoices reflect direct inflow.

[20] As a result of this conclusion, I find it unnecessary to address the General Counsel's contention that the Respondent's receipt of Paycheck Protection Program (PPP) loans from the federal government, which did not have to be repaid, established the Board's jurisdiction over the company.

[21] This appears to be the correct spelling of Ms. Rodriguez's last name, although she herself spelled it R-o-d-e-r-i-g-u-e-z when testifying at the hearing. (Tr. 486.)

[22] Tr. 24, 150–151, 222, 353–354, 451, 467, 522.) In its answer to the second amended complaint, the Respondent admitted that Cody Lovins, Thomas, Rodriguez, and Hall were Sec. 2(11) supervisors.

[23] Tr. 62, 404, 471.

or more minutes and rest breaks are 10 minutes for every four hours worked. The policy prohibits employees from leaving the store for a rest break. Only one employee at a time may take a rest break. The policy also states that, if business did not permit a full lunch period, the Respondent would make every effort to provide an employee with a paid rest break to eat. The policy notes that, because clients often come in for haircuts during the lunch-time period, stylists should take their lunch breaks at other times when clients were not in the store.[24]

In practice at the Montgomery location, employees receive a 30-minute break when they work 6 hours and an hour break for anything more than 6 hours. Short breaks for the bathroom or a quick bite to eat also are allowed. Employees are required to tell a manager when they are going on break. Breaks can be taken at any time stylists are between clients. If the salon is busy, management delays the breaks until it slows down.[25]

The Respondent's employee handbook also contains a "Code of Conduct" with a section on setting forth examples of "gross misconduct" which could result in immediate disciplinary action including termination. The examples include: (1) Refusing to work scheduled hours; (2) Diverting clients away from the store or any other Sport Clips store; (3) Giving out home or cell phone numbers to clients or collecting clients' phone numbers; (4) Disregarding specific instructions from the manager in charge of the store; (5) Caus[ing] confrontations with clients or other employees; and (6) Flagrantly violat[ing] established policies and procedures. The Montgomery location utilizes progressive discipline consisting of verbal, counseling statement, corrective statement, and termination.[26]

B. Weisinger's Prior Discipline

In May 2020, the Respondent reopened its Montgomery location following the COVID-19 shutdown in the State of Texas. At that time, Weisinger had risen to the position of assistant manager. On May 23, 2020, a slow business day, a new employee asked Weisinger if she could go home early. Feeling that the employee was not particularly good at cutting hair, Weisinger instead suggested to the employee that she stick around so Weisinger could show her how to fade cut once a customer arrived. Weisinger added that it was her store and she wanted it to do good for the Sport Clips name. She ended by saying that if the store had an employee who was not very good, it would get around Montgomery because it was a small town.[27]

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[24] GC Exh. 15, pp. 29–30 of the handbook.

[25] Tr. 207.

[26] GC Exh. 15, pp. 49–50 of the handbook; Tr. 550–551.

[27] Tr. 25–26. Weisinger testified that, during the shutdown, she had a miscarriage. She claimed that, about a week prior to the reopening, she informed Thomas of the miscarriage. Weisinger testified Thomas responded that she was glad because it actually was not the right time for the company for Weisinger to be pregnant. (Tr. 31–32.) Thomas vigorously denied making this statement. (Tr. 385–386.) I credit Thomas's denial. The alleged comment is appalling. Thomas revealed at trial that she too had a miscarriage. I cannot fathom she would make the comment in light of that. Furthermore, Thomas's demeanor when testifying on this was reflective of reliable testimony. Finally, if Thomas had made the comment, I find it likely that Weisinger would have reported it to someone. However, Weisinger did not

On May 26, 2020, the Respondent demoted Weisinger from her assistant manager position as a result of both a corrective interview and a counseling statement she received that day. The corrective interview concerned the May 23, 2020, conversation with the new employee. Thomas, the director of operations, told Weisinger that she needed to learn how to speak to other employees and be nice, because nobody wanted to work with her. A corrective interview report signed by Hall and Weisinger stated that the reason for the interview was "Compliance with Sport Clips policies" and "Relationships with other Team Members." Hall specifically wrote that Weisinger "spoke inappropriately to another team member in front of clients and team members." She also stated "if the behavior occurs again terminate her…"[28]

The counseling statement to Weisinger was for conduct that the form stated occurred on May 11, 2020. Hall wrote in the statement that Weisinger failed to follow COVID-19 protocols with a client and spoke inappropriately to another team member on the floor. Hall further stated that Weisinger "must maintain professional behavior and conversation in front of team members and clients." She said, "clients will not return if they do not enjoy the experience and team members will leave if they feel the environment is hostile." Hall repeated that Weisinger could be terminated if the behavior happened again.[29]

C. Weisinger's and Raney's Complaints About Breaks

On January 1, 2021,[30] Weisinger spoke with fellow stylist Raney about how she was feeling very sick at the time. She stated that, if she was working long hours, she would bring up

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testify that she did so. I conclude that, while Thomas may have commented on Weisinger's miscarriage, Weisinger embellished any statement that she actually made.

[28] Tr. 27; R. Exh. 13, attachment to Barbara Rodriguez's affidavit submitted to the Equal Employment Opportunity Commission (EEOC). (Weisinger filed a charge with the Texas Workforce Commission Civil Rights Division and the EEOC alleging that the Respondent discriminated against her because she was pregnant. R. Exh. 25.)

The record evidence is unclear concerning the statement on the discipline form that Weisinger's May 23, 2020, conversation with the new employee occurred in front of other employees and clients. When Thomas was questioned about the corrective interview report, she simply read the text on the form but did not further elaborate. (Tr. 383–384.) Weisinger did not testify about who else was present, if anyone, when she had the conversation with the new employee. Absent further details from Thomas, I decline to find that other team members and clients were present during that conversation.

[29] Tr. 365–366, 523; R. Exh. 13, attachment to Rodriguez's EEOC affidavit. No additional details were introduced regarding Weisinger's conduct which resulted in this discipline.

Weisinger admitted that she has a very loud voice, as was confirmed by Thomas, Hall, and Nino. (Tr. 85, 453, 468, 532.) Thomas and Hall testified that Weisinger often had conversations on the floor with clients that were not appropriate, including discussing her personal life or making political comments about COVID-19. They also provided conclusory or hearsay testimony, to which I give little weight, that customers and other team members told them at times that Weisinger made them feel uncomfortable. (Tr. 362–363, 402, 532.) The Respondent did not introduce any additional written discipline for Weisinger concerning these alleged performance issues.

[30] All dates hereinafter are in 2021, unless otherwise specified.

with Hall her need for breaks because of her illness. Weisinger later learned that she was pregnant and in her first trimester. On January 5, she advised Hall of the news. Thereafter in January, Weisinger frequently was ill with nausea and body aches. On January 11, she advised Hall that she was very sick and was throwing up a lot. She found that sitting down for a bit and eating something helped.[31]

Also in January, stylist Nino returned to work after having her own child. Consistent with federal law and with management approval, Nino was permitted to take breaks to pump breast milk for her baby.[32] In that same timeframe, Weisinger sought to take additional breaks due to frequently being sick from her pregnancy. However, she found that Nino was constantly on break when she or other employees wanted to take a break. Weisinger complained to Nino that she was taking breaks too often. She also complained to fellow stylist Bryce about the same thing. In that same month, Weisinger and Raney discussed their inability to get breaks during their scheduled shifts.[33]

Sometime in mid-January, Weisinger told Hall that she felt Nino was taking an excessive number of breaks and not communicating to others when she was taking them. Hall disclosed Weisinger's complaints to Nino, but she told Nino she was not going to take any action and Nino had the right to pump breast milk.[34]

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[31] Tr. 34–38; GC Exh. 4. Weisinger's testimony concerning her conversation with Raney lacked a full foundation and was very limited concerning what was actually said between the two. However, the wording of Weisinger's testimony establishes that she told Raney she would speak to Hall about her own need for breaks while ill. She stated that she told Raney "I need breaks if I'm working long hours" and that "I would bring it up to [Hall]…"] (Tr. 63.) Raney's testimony about her discussions with Weisinger occurred after Weisinger learned she was pregnant. Thus, Raney did not testify concerning this conversation in early January, which occurred prior to Weisinger learning she was pregnant.

Back in October 2019 when Raney was an assistant manager, Weisinger and Raney discussed not being able to take a break when only two people were working. Raney raised this concern with Veronica Lovins and Thomas, but the Respondent took no action. (Tr. 224–226, 248–249, 588–592; R. Exh. 59.)

[32] The federal law is part of the Fair Labor Standards Act at 29 U.S.C. § 207(r).

[33] Tr. 235–238, 453–455, 468–472. Again, Raney's testimony concerning her conversation with Weisinger about breaks lacked a full foundation and was very limited concerning what the two actually said to one another. Furthermore, although Bryce and Nino testified that Weisinger complained about Nino's breaks, they did not testify concerning their responses, if any, to her complaints. Finally, the record also fails to establish when specifically in January any of these conversations occurred.

[34] Tr. 79–80, 468–473, 524–526. Weisinger did not testify on direct examination concerning her initial conversation with Hall about Nino's breaks. On cross examination, she confirmed generally that she told Hall that Nino was taking too many breaks and not communicating about them to fellow employees. Hall likewise testified in conclusory fashion that Weisinger complained about Nino taking too many breaks. Hall's testimony also establishes that the first conversation took place in mid-January, around January 14.

D. The January 21 Argument Between Weisinger and Hall Over Breaks

About January 18, one of Weisinger's clients brought food in for her and the other employees. However, several clients who had requested Weisinger specifically were waiting to have their hair cut. Weisinger went to the break room to eat a few bites of food, but was unable to take a full break the remainder of her shift.[35]

On Thursday, January 21, Nino called off from work, leaving only Hall and Weisinger at the salon. Weisinger was sick again. Weisinger asked Hall if she had spoken to Nino about breaks. Hall responded that she was not going to get into that with Weisinger. Weisinger then told Hall that she would need to get some little breaks in now that she was pregnant. She said that she could not work like she used to before she was pregnant. Hall responded, "You will take a break if and when I tell you that you can." Weisinger told her no, she was going to take a break if she felt sick or lightheaded or if she was hungry and her stomach hurt. She added that, during her pregnancy if she felt like she was about to throw up, she would clock out and take a break. At points in this conversation, Weisinger and Hall were yelling at each other. Weisinger also threw mascara she had in her hand into her mascara bag at her station.[36]

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[35] Tr. 40-41, 554–555. Weisinger and Hall both testified concerning these events. The above findings of fact reflect the portions of their testimony that were consistent. The conflict in their testimony came over the circumstances leading to Weisinger not being able to take a break. Resolving that conflict is not necessary to deciding the substantive issues in this case but, in the event the Board disagrees, I will make a credibility determination on that question. Weisinger testified that, when she first had an opportunity to take a break and eat the food, Hall told her to take the next haircut. She told Weisinger the client after the next haircut had specifically requested Hall and Hall did not want her client to wait. In contrast, Hall denied telling Weisinger to take the next client. Instead, she testified that the next client had requested Weisinger and Weisinger said she would take her client. I credit Hall's testimony, as she appeared earnest and genuine when providing it.

I further note that, through a leading question, Weisinger confirmed that these events occurred on January 18, but timekeeping records of the Respondent indicate that Weisinger did not work that day. (R. Exh. 60.) Hall did not testify as to the date. Thus, I find the events occurred about January 18.

[36] Tr. 41–43, 87–88, 526–528. The testimony of Weisinger and Hall about their January 21 argument largely was consistent, including as to the comment Hall made to Weisinger about taking breaks. Weisinger testified that Hall said, "You will take a break if and when I tell you that you can" and Hall testified that she said to Weisinger that "she would need to take a break when I told her that day." Under either scenario, Hall was telling Weisinger that Hall, a supervisor, would decide when Weisinger could take a break. Where their testimony conflicts, I credit Weisinger's testimony on this subject, because it was more specific and detailed. Moreover, Hall herself conceded she was having difficulty recalling what exactly the two said to each other and a statement she wrote shortly after the conversation is consistent with Weisinger's testimony. (Tr. 527, 531; R. Exh. 10.) However, I do not credit Weisinger's self-serving testimony that she "also was going to talk to [Hall] about, you know, with all the other girls that we should make it more organized with breaks, but I didn't get that far with her." (Tr. 63.) I also do not credit Weisinger's testimony that she dropped her mascara into the mascara bag. Hall testified that she threw it into the bag and, given the heated nature of their conversation, I credit that testimony.

Shortly thereafter, both Weisinger and Hall called Thomas and briefly ended up on a conference call together with her. Then Thomas asked to speak to Weisinger individually. Weisinger told Thomas about her disagreement with Hall over breaks, how Hall had yelled at her, and how upset it had made her. In response, Thomas asked Weisinger if her pregnancy was making her "mentally unstable." Now yelling again,[37] Weisinger responded that working long stressful hours made her uncomfortable and could harm her child in the first trimester. Weisinger also said the stress, yelling, and the insults were making her even more sick and nauseous. She then told Thomas she was so upset that she could not work, needed to leave for a little bit, and would be back to work. Thomas responded that nobody else was there, she did not want to leave Hall by herself, and asked Weisinger if she could stay. Weisinger told her she could not and again expressed concern about her unborn child. As a result, Thomas told her she could go and that Thomas would contact her later in the day. Within 15 to 20 minutes after Weisinger left, Thomas texted her and said, "Please don't come in today." Later that afternoon, Thomas called Weisinger and told her she needed to think about if she wanted to work at Sport Clips and if it was the right place for her while she was pregnant. Weisinger said yes and that she had a lot of clientele there. Thomas told Weisinger to take a couple of days off and she would talk to her again on the following Monday.[38]

Thomas did end up calling Weisinger on January 25, but the call apparently was cut short after Weisinger's mother overheard the discussion and intervened to defend her daughter. On that same date, one of Weisinger's clients, Chris Ogorchock, texted her to ask for a haircut appointment. Weisinger sent back her upcoming schedule and told the client that she was having problems with Sport Clips, had not been there since the 21st because she got in trouble, and should know if she was going back or not that day. When the client asked what happened, Weisinger told him she was pregnant, she and her manager got into it about Weisinger needing breaks, the manager had yelled at her and she yelled back, and she was the only one who got in

[37] Weisinger testified she was justified in yelling at Thomas and Hall during her discussions with them on January 21. (Tr. 86.)

[38] Tr. 43–47, 87–89, 366–374, 385–386, 527–528, 557–558; Jt. Exhs. 3 and 6; R. Exh. 20 (p. 33). Weisinger and Thomas testified about their phone discussions on January 21. Again, the testimony was largely consistent and these findings of fact, in part, are a combination of uncontradicted statements that each testified where made during the calls. The findings of fact required two credibility determinations. First, I credit Weisinger's testimony that Thomas asked Weisinger if her pregnancy was making her "mentally unstable". (Tr. 43–44; 386.) The testimony is corroborated by other, contemporaneous communications by Weisinger. In particular, Weisinger reported the comment to both Veronica Lovins and a customer of Weisinger's in the days subsequent to the conversation. (GC Exh. 3; R. Exh. 21.) Second, I credit Thomas's testimony that she did not tell Weisinger she was suspended. (Tr. 372–374.) Rather, Thomas told her to take a couple of days off and she would call Weisinger on the following Monday. The subsequent written discipline the Respondent issued to Weisinger due to her January 21 conduct makes no mention of a suspension. (Jt. Exh. 3.) That would be logical had Thomas used that terminology when speaking to Weisinger. I further note the General Counsel's complaint does not allege that the Respondent unlawfully suspended Weisinger. Nonetheless, Weisinger obviously viewed her time off as a suspension because she subsequently referred to it as such.

trouble. She also told the client that her area manager asked her if she was mentally stable to do her job while pregnant, which set her off again and caused her to yell at her area manager.[39]

E. The Respondent's January 26 Discipline of Weisinger for Her Argument with Hall

On January 26, Weisinger returned to work. After she arrived, Thomas and Rodriguez met with her in the break room. Rodriguez gave Weisinger a last and final corrective action and told her she needed to sign it or she would be terminated. Rodriguez told Weisinger she needed to project a professional image with clients and other team members and needed to conduct herself in a professional manner. She and Thomas also told Weisinger "this should stay between us." The corrective action stated that, on January 21, Weisinger:

> disrupted the business flow of the store, displaying unprofessional behavior while in the store and disregarding of management team. Walking out & abandoning scheduled shift is unacceptable and will not be tolerated, Megan must follow Sportclips (sic) policies and conduct herself in professional manner.

The reasons for the action included compliance with Sport Clips policies; relationship with other team members; failure to meet standards and expectations; and gross misconduct. In the meeting, Weisinger wrote this response on the action:

> I left my shift because Chrysta told me I could go for a little bit to calm down. I did so and let her know I was coming back. Chrysta told me not to come back that she had my shift covered so therefore I wasn't allowed to come back.
>
> With Stacy we get along just fine except that day I simply apologized to her for something and she clearly didn't like it so she raised her voice at me so yes I got upset.
>
> Then with Chrysta there has been many situations that she has said rude things like if I was mentally stable while pregnant/she was glad I lost my last baby because it wasn't the right time for the company and more."

Finally, the corrective action stated that Weisinger's employment would be terminated if she continued to violate policies and procedures. Following the meeting, Thomas and Rodriguez advised Hall that they had told Weisinger not to discuss the corrective action on the floor with clients or anyone else.[40]

[39] Tr. 92; GC Exh. 3.

[40] Jt. Exhs. 4, 6; Tr. 48–54, 504, 562, 578–579.

Thereafter on that same date, Weisinger spoke to Raney and told her she had been suspended for 5 days. She said she was suspended because she got upset with Hall over not being able to take breaks when she needed to, because Nino would say she had to go pump. She added that she told Hall about it, but Hall did not do anything. On January 27, Weisinger also told Nino and Carroll about her suspension and the reasons for it. Carroll and Raney responded to Weisinger's comments by saying something to the effect of her suspension was ridiculous. However, neither Carroll nor Raney said anything more in response.[41]

F. The January 27, 2021, Conversation Between Weisinger and a Customer on the Salon Floor

Also on January 27, Weisinger and Nino were working on the salon floor with clients at stations that were about six to eight feet apart. Ogorchock came in for his haircut with Weisinger and the two had a conversation. Given their proximity to Weisinger's station and the fact that Weisinger was speaking loudly, Nino and her client could hear the conversation. Ogorchock asked Weisinger how she was doing. Weisinger told him about what happened the day before. She explained to Ogorchock that she was disciplined for yelling and they told her she needed to not be so loud and be more respectful towards others. She said she almost got fired previously because she was not using masks properly during COVID-19. Finally, she told him about Thomas' "mentally unstable" comment and Ogorchock responded "that's a lawsuit right there." Weisinger responded that she was sure it was but she was not going to do it, because she still worked there. She also explained that she previously wanted to sue the owners and manager, because her manager (Thomas) said that it was a good thing that she had a miscarriage because her being pregnant was not good for business. But she did not do so because her father had been sued so many times that she knew it ruins peoples' lives. After hearing this, Nino's client said to Nino "so that's what happens at Sport Clips." Although Nino's client had requested a haircut and a wash, he cancelled the wash and left the salon once the haircut was done.[42]

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[41] Tr. 55–59, 238–240, 251–252. These findings of fact with respect to Raney are based upon Weisinger's testimony, which Raney credibly corroborated. As to Carroll and Nino, Weisinger's testimony is uncontested, because Carroll did not testify and Nino did not deny that Weisinger told her about the "suspension". Although Weisinger testified that all these conversations occurred on January 27, I find that the conversation with Raney took place on January 26, as testified to by Raney and confirmed by the Respondent's payroll records showing Raney worked on January 26 but not January 27. (R. Exhs. 55, 56.) I further note that, when discussing her conversation with Raney about the discipline, Weisinger alluded to their January 1 one-on-one conversation when she told Raney that she "was going to bring it [breaks] up." As previously discussed, Weisinger only discussed her need for breaks, not other employees' needs, in that conversation with Raney.

[42] Tr. 59–60, 64–65, 107–110; 474–477, 483–484; R. Exh. 11. The testimony of Weisinger and Nino regarding what happened was consistent and the findings of fact are based on their uncontradicted statements concerning what was said. Where it conflicts, I credit Weisinger, who had more specific recall and whose demeanor appeared believable while she testified about this. The Respondent argues that Ogorchock was not the customer whom Weisinger spoke to about her discipline on January 27, citing to a text message from Nino to Hall that day identifying a different person. (GC Exh. 26.) However, Nino was not questioned on this topic at the hearing and, absent any corroboration and explanation as to how

Nino texted Hall the same day and told her that Weisinger had been loudly discussing with a client her meeting the prior day with Thomas and Rodriguez. Nino also advised Hall about her customer leaving without completing all his planned services. Hall responded, "The thing is Barb Chrysta and Veronica told her she better not talk about it to anyone, especially her clients and here she is."[43]

G. The Respondent's January 28, 2021, Discharge of Weisinger

Hall later advised Thomas of what had occurred on January 27. Thomas then investigated the incident by talking to Hall and Nino. However, Thomas did not talk to Weisinger. Thereafter, Cody Lovins, Thomas, and Rodriguez made the decision to terminate Weisinger.[44]

When Weisinger arrived for work on January 28, Hall was there with Cody Lovins. Hall told Weisinger they had to let her go. Weisinger asked her why and Hall responded that she had violated her final corrective. Weisinger then asked if it was due to her conversation with her client the prior day. Hall repeated that Weisinger violated her final corrective action. Although Hall did not provide a written termination form to Weisinger, she did complete an internal separation document. Hall stated the reason for the discharge was:

> Violation of company policy. Megan was on a final corrective as of 1/26/21. Megan continued to flagrantly violate Sport Clips policies and procedures for which she knows and final corrective signed, handbook acknowledgement, other witness documentation included with separation form.[45]

ANALYSIS

The General Counsel's complaint alleges that, on January 27, Charging Party Weisinger engaged in protected concerted activity with other employees for the purpose of mutual aid and protection by raising group concerns about employment conditions, including employee

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she came to that conclusion, her hearsay text does not establish the claimed fact.

[43] Tr. 477–478, 559; GC Exh. 26. Hall testified that Thomas and Rodriguez told her directly that Weisinger was not to discuss her corrective for the January 21 conduct on the floor with clients or with anyone. (Tr. 562.)

[44] Tr. 378–382, 414.

[45] Tr. 65–67, 541–542, 564; Jt. Exh. 5. I credit Hall's testimony regarding the reasons she told Weisinger she was being discharged. The lack of explanation is consistent with the Respondent not providing a written explanation for the discharge at the time. In addition, Hall's demeanor when providing the testimony appeared authentic. I do not credit Weisinger's testimony that Hall told her she was discharged because she made coworkers and clients uncomfortable when she talked about being suspended and the breaks. The testimony came across as self-serving and designed to conform to the General Counsel's theory of a violation.

breaks and discipline, during a scheduled shift. The complaint further alleges that the Respondent violated Section 8(a)(1) of the Act by discharging Weisinger on January 28 due to that protected concerted activity. In conformance with the first allegation, the General Counsel argues that Weisinger's discussions on January 27 with employees and a customer concerning her discipline for arguing with Hall about breaks was protected concerted activity.

However, the General Counsel also argues that Weisinger engaged in protected concerted activity throughout January 2021 by discussing breaks with her coworkers. The complaint contains no such allegation. Thus, a preliminary question arises as to whether it is appropriate to consider the General Counsel's unpled allegation, which would require a de facto amendment to the complaint. To determine if that is proper, the test is whether the issue is closely connected to the subject matter of the complaint and has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990). Both conditions are met here. The two allegations involve the same ultimate issue: whether Weisinger engaged in protected concerted activity. The conduct occurred close in time and was part of a sequence of events leading to Weisinger's discharge. The issue likewise was fully litigated, as the Respondent cross-examined Weisinger and Raney and, during its case-in-chief, questioned Bryce and Nino concerning their conversations with one another regarding breaks in January 2021. Thus, the Respondent would not have altered its conduct had it known the General Counsel was going to include the unpled allegation in the complaint. Under these circumstances, it is proper to consider the General Counsel's unpled allegation. *Kankakee County Training Center*, 366 NLRB No. 181, slip op. at 3–4 (2018).

I. DID WEISINGER ENGAGE IN PROTECTED CONCERTED ACTIVITY?

A. Legal Framework

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 7 protects employee conduct that is both "concerted" and engaged in for "mutual aid and protection," guaranteeing "the right of workers to act together to better their working conditions." *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14 (1962).

To find an employee's activity to be "concerted," the conduct must be engaged in with or on the authority of other employees, and not solely by and on behalf of an individual employee. *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity includes an individual employee bringing a truly group complaint regarding a workplace issue to management's attention or when the totality of the circumstances supports a reasonable inference that the employee was seeking to initiate, induce or prepare for group action. *Alstate Maintenance*, 367 NLRB No. 68, slip op. at 3, 7 (2019); *Whittaker Corp*, 289 NLRB 933, 933–934 (1988). Moreover, while no group action may have been contemplated, activity by a single individual is concerted, where the

concerns expressed by the employee are a logical outgrowth of concerns previously expressed by a group. *Summit Regional Medical Center*, 357 NLRB 1614, 1617 fn. 13 (2011); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991).

The "mutual aid or protection" clause focuses on the goal of concerted activity, specifically whether the employee or employees involved are seeking to improve their terms and conditions of employment or otherwise improve their lot as employees. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Proof that employee action inures to the benefit of others is proof the action is for mutual aid or protection. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 155 (2014).

B. The Discussions Between Weisinger and Other Employees

The record evidence concerning Weisinger's discussions about breaks with other employees in January 2021 is quite limited and, at times, unclear. At most, it demonstrates that, during that month, Weisinger complained to Raney about her inability to take breaks when she was feeling ill due to her pregnancy. The two also generally discussed their inability to get breaks. Although Weisinger attributed that to Nino taking too many breaks to pump breast milk for her baby, the evidence does not establish that she discussed that with Raney. Rather, Raney testified that "employees" were "upset" with Nino for taking too many breaks. Weisinger also complained to both Bryce and Nino herself about Nino's breaks, but neither employee responded to her. Beyond this, the record is bereft of any specific statements made by Weisinger and the other employees to each other concerning the issue.

This evidence fails to establish that Weisinger's activity was concerted. In *Mushroom Transportation Co., Inc. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964) ("fully embraced" by the Board in *Meyers II*, 281 NLRB at 887), the court explained:

> It is not questioned that a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least that it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.
>
> This is not to say that preliminary discussions are disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. We recognize the validity of the argument that, inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.

> However, that argument loses much of its force when it appears from the conversations themselves that no group action of any kind is intended, contemplated, or even referred to.

Here, neither Weisinger nor other employees stated that they should raise the lack-of-breaks issue with management or otherwise indicated an intent to engage in group action to remedy it. Then when Weisinger first spoke to Hall about the issue in mid-January, she did nothing more than report the complaint itself. She did not state that other employees shared the complaint or that she was bringing it to Hall's attention on behalf of other employees. When she subsequently argued with Hall about the issue on January 21, she told Hall that the problem was her individual inability to take breaks which she needed because of her pregnancy. Again, she made no reference to other employees or that she was raising collective concerns. As a result, Weisinger's discussions with employees and her argument with Hall was griping of a purely personal nature, not concerted action. *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 3–4 (2019); *Alstate Maintenance, LLC*, supra, slip op. at 3–4; *Daly Park Nursing Home*, 287 NLRB 710, 710–711 (1987).

The General Counsel, relying on *Mushroom Transportation*, argues that these conversations were concerted "preliminary discussions" regarding the unfairness of breaks. But *Mushroom Transportation* makes clear that even preliminary discussions must refer in some manner to group action. The court also decided in that case that an employee did not engage in concerted activity simply by discussing employees' rights with respect to terms and conditions of employment. Contrary to the General Counsel's position, *Mushroom Transportation* actually supports the conclusion that Weisinger's conduct was not concerted.

Accordingly, I conclude that Weisinger did not engage in traditional protected concerted activity during her conversations with other employees about breaks.

However, the General Counsel also argues that Weisinger's discussions with other employees about breaks are "inherently concerted." The Board has found that employee discussions concerning wages, job security, and work schedules are inherently concerted, and protected, regardless of whether they are engaged in with the express object of inducing group action. *Trayco of S.C., Inc.*, 297 NLRB 630, 634–635 (1990) (wages), enf. denied mem. 927 F.2d 597 (4th Cir. 1991); *Hoodview Vending Co.*, 359 NLRB 355, 357–358 (2012) (job security), reaffd. 362 NLRB 690 (2015); *Belle of Sioux City*, 333 NLRB 98, 105 (2001) (work schedules); *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995) (work schedules), enf. denied in relevant part 81 F.3d 209 (D.C. Cir. 1996). The Board's rationale for finding discussions about these working conditions inherently concerted was that the topics are vital terms and conditions of employment and the "grist" of which concerted activity feeds.

In *Aroostook County*, supra, an employer required four employees of an eye surgery center to work at a different physical location than the one at which they had been scheduled to work. The employees complained to one another and other co-workers about the location change, but did not discuss any group action to protest it. Upon learning of the complaints, the

employer discharged the employees. In holding the discharges unlawful, the Board found the employees' complaints to be inherently concerted, stating:

> Changes in work schedules involve when and where employees will work. They are directly linked to hours and conditions of work—both vital elements of employment—and are as likely to spawn collective action as the discussion of wages.

In *Belle of Sioux City*, supra, an employer scheduled two employees to work on a holiday but, after the employees reported to work, decided only one would be needed due to a lack of business. One of the employees, disgusted by the situation, agreed to leave and was not paid for the day. In subsequent workdays, the employee who left told other coworkers about what happened. Her coworkers responded that they did not think it was fair and the employee should have been paid for that day. The Board adopted, without comment, the judge's decision, including that the employee discussions about what happened were inherently concerted because they involved "a speaker and listeners."

In this case, Weisinger and Raney spoke to one another about their inability to get breaks. Weisinger also complained to Raney and other employees about Nino's breaks. Although the employees did not discuss any group action, the Board has defined "work schedule" broadly enough that breaks must fall within that definition. Breaks are a component of employees' work hours and when they will be working. As a result, the Board's decisions in *Aroostook County* and *Belle of Sioux City* require me to conclude that the conversations were inherently concerted activity.

In reaching this conclusion, I recognize and have considered that, on appeal, the District of Columbia Court of Appeals rejected the Board's unlawful discharge finding in *Aroostook County*. In so doing, the court stated in dicta that it did not "understand or endorse" the Board's inherently concerted doctrine. The court also labeled the doctrine as "limitless and nonsensical," noting that adoption of a per se rule that any discussion of working conditions is automatically protected as concerted activity finds "no good support in law." Indeed, many additional terms and conditions of employment, including safety, health insurance, and retirement benefits, might all be deemed vital. Nonetheless, it is an administrative law judge's duty to apply established Board precedent which the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984). Without question, Board precedent holds that employee discussions about work schedules are inherently concerted. No plausible argument can be made that the term "work schedule" does not include breaks. Thus, Weisinger's discussions with other employees about breaks were inherently concerted.[46]

[46] The General Counsel also argues that Weisinger's complaints about the lack of breaks were inherently concerted because they were motivated by her health and safety concerns for herself and her baby during her pregnancy. Taking nothing away from the importance of such concerns, the Board has not found that health and safety complaints are inherently concerted. Again following precedent, I decline to so find and leave it to the Board to expand the doctrine if it so chooses.

Finally, the General Counsel contends that Weisinger engaged in traditional protected concerted activity by informing other employees on January 27 about the discipline the Respondent imposed upon her for arguing with Hall. I find no merit to this argument. Employees have a Section 7 right to discuss their own or their fellow employees' discipline, where doing so is not mere griping but rather looks to group action. *Apogee Retail LLC d/b/a Unique Thrift Store*, 368 NLRB No. 144, slip op. at 8 (2019). Weisinger told other employees about her "suspension" and the reasons for it. However, she did not attempt to enlist the assistance of any of the employees to challenge the discipline. Although the employees thought the discipline was "ridiculous," none of them suggested any course of action, whether individual or as a group, in response. Therefore, I conclude that activity is not concerted because no group action was contemplated or referred to during the discussions.[47] See *Kingman Regional Medical Center*, 363 NLRB at 1390.

C. The Communications Between Weisinger and a Customer

Summarizing the evidence, Weisinger spoke to a client on both January 25 via text and January 27 on the salon floor. In the first communication, Weisinger said that she was having problems with Sport Clips and had not worked for days because she got in trouble. She also told the client that she had yelled at her manager during an argument over Weisinger needing breaks. On January 27, Weisinger told the same client that she had been disciplined for the argument with her manager. She also told the client about being disciplined six months earlier for not wearing masks properly during COVID-19. When she then advised the client that her supervisor had asked if she was mentally unstable from her pregnancy, the client responded: "that's a lawsuit right there." However, Weisinger said she was not going to sue. She further explained that she wanted to do so previously when a manager said her being pregnant was not good for business, but decided against it because lawsuits ruined people's lives. Nino and her client could hear the conversation. After Weisinger's last comment, Nino's client stated: "so that's what happens at Sport Clips," then left without completing his scheduled services.

Employee communications to third parties, including customers, in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employer and the communication is not so disloyal, reckless or maliciously untrue as to lose the Act's protection. *MasTec Advanced Technologies*, 357 NLRB 103, 107 (2011). I conclude that Weisinger's discussion with her client was not protected under the first prong of this test. At no point in the two communications did Weisinger indicate to her client that she and her coworkers had an issue with not being able to take breaks. She

[47] I further note that the General Counsel only is arguing that Weisinger's discussions about her discipline with coworkers constituted protected concerted activity. The General Counsel does not argue, or allege in the complaint, that the Respondent violated Section 8(a)(1) by instructing Weisinger not to discuss the discipline with other employees, despite the record evidence suggesting that occurred. See *Inova Health System*, 360 NLRB 1223, 1228–1229 (2014).

also never stated to him that her coworkers also objected to her discipline. All of her statements dealt only with her own individual conflict with her supervisors. The communications did not indicate they were related to an ongoing labor dispute between Sport Clips employees and management. In addition, Weisinger never sought to enlist her client's support with breaks or her discipline. She did not ask him to speak with management or to take any other action on behalf of her and her coworkers. Thus, Weisinger's discussions with her client were not protected. *Mountain Shadows Golf Resort,* 330 NLRB 1238, 1241 (2000) (distribution of handbill was not protected where it made no mention of a labor dispute, management's treatment of employees, or any other issue related to employees' terms and conditions of employment); *PAE Applied Technologies*, 367 NLRB No. 105, slip op. at 4 (2019) (union president did not engage in protected conduct in discussion with customer about the suspension of two employees, because the president did not appeal to the customer for support in his dispute with the employer over the suspensions).

The cases relied upon by the General Counsel where communications were found protected reinforce this conclusion. In *Allied Aviation Service Co. of New Jersey*, 248 NLRB 229, 230 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980), an employee wrote two letters to customers in which he described safety concerns that "mechanics" had and asked the customers to talk to management. In *Endicott International Technologies, Inc.*, 345 NLRB 448, 450 (2005), enf. denied 453 F.3d 532 (D.C. Cir. 2006), the employer purchased a business and, 2 weeks later, implemented a mass layoff of 200 employees. An employee was quoted in a newspaper article expressing concern for employees who continued working at the plant. A similar comment on a website referred to the "job losses." Finally, in *Greenwood Trucking, Inc.*, 283 NLRB 789, 792 (1987), two employees who were married discussed with one another and other employees their salary checks bouncing due to insufficient funds in the employer's account. An employer representative told the husband that the issue was a customer failing to make timely payments to the employer for its services. The husband then contacted the customer to verify the claim, which the customer denied. The employer learned of the call and that it was made on behalf of both the husband and the wife. In all of these cases, the conduct of the involved individuals established that the expressed concerns were for a group of employees, not an individual employee, and thus were protected. In contrast here, Weisinger never referred to other employees when talking to her client. She did not tell her client that the discipline arose from concerns that she and other employees had about breaks. She did not say that the other employees felt her discipline was ridiculous.

Finally, *Butler Medical Transport, LLC*, 365 NLRB No. 112 (2017), also cited by the General Counsel, is inapposite. There, an employee posted about her discharge on Facebook. Another employee posted in response that the employee should think about getting a lawyer or going to the Labor Board. The Respondent fired the responding employee for his post. The Board found the responding employee's post to be protected concerted activity. That case involved communications between two employees, not an employee and a customer.

For all these reasons, I conclude that Weisinger's communications with her customer were not protected.

II. DID THE RESPONDENT'S DISCHARGE OF WEISINGER VIOLATE SECTION 8(A)(1)?

The General Counsel's complaint alleges that the Respondent violated Section 8(a)(1) by discharging Weisinger on January 28 due to her protected concerted activity.

A. Legal Framework

Determining the legality of the Respondent's discharge of Weisinger requires the application of the Board's well established *Wright Line* framework.[48] *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The *Wright Line* framework is inherently a causation test. *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 7 (2019), quoting *Wright Line*, 251 NLRB at 1089 ("[The Board's] task in resolving cases alleging violations which turn on motivation is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment."). To prove a discriminatory discharge for protected concerted activity under that framework, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in the employer's discharge decision. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). The General Counsel satisfies the initial burden by showing (1) the employee's protected concerted activity; (2) the employer's knowledge of the concerted nature of the activity; and (3) the employer's animus toward that activity. *Alternative Energy Applications Inc.*, 361 NLRB 1203, 1205 (2014). If the General Counsel makes the initial showing, the burden shifts to the employer to prove that it would have discharged the employee even in the absence of the employee's protected activity. *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for the discharge; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). When the employer's stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—discriminatory motive may be inferred but such an inference is not compelled. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 3 (2019).

[48] Both the General Counsel and the Respondent analyze the legality of Weisinger's discharge under *Wright Line*. Given that the General Counsel is alleging that the discharge was motivated, in part, by Weisinger's discussion of breaks with employees in January 2021, I find the application of *Wright Line* to be appropriate. If the allegation was that the discharge was motivated solely by Weisinger's conversation with her customer on January 27, then the only question would have been whether that conversation was protected and the application of *Wright Line* would not be appropriate. *Readyjet, Inc.*, 365 NLRB No. 120, slip op. at 1 fn. 4 (2017).

B. Did the Respondent Have Knowledge of the Concerted Nature of Weisinger's Protected Concerted Activity?

As previously discussed, Weisinger engaged in protected and inherently concerted activity in January 2021 when discussing with other employees the lack of breaks. However, the record evidence fails to establish that the Respondent's managers were aware of the concerted nature of those employee discussions. When Weisinger spoke to Hall about her concern that Nino was taking excessive breaks, she never stated that she had spoken to other employees about the issue and that they expressed the same concerns. Her January 21 argument with Hall was a result of Weisinger telling Hall that she herself needed and would take breaks when she was sick from her pregnancy. She reported to Thomas the same day that the argument was over breaks, but not that other employees besides her had an issue with breaks. None of Weisinger's coworkers spoke to Hall or another supervisor about breaks in that month. The Respondent knew that Weisinger complained about Nino taking excessive breaks, but not that other employees felt the same way.

The General Counsel contends that knowledge is established by the testimony of Bryce and Cody Lovins, as well as Thomas's statement recounting the events of January 25. The evidence relied upon to support that contention falls well short of establishing such knowledge.

Bryce testified that Weisinger constantly complained about Nino taking too many breaks. She stated that she would be in the salon or the break room when doing so. The only mention of Hall in her testimony was:

> I do remember telling Stacy at one point that it felt like all the girls that had worked there previously before we had come in was against our prior team almost because the only complaints that were coming from staffing were the girls that had worked at that store before we had come in after the pandemic in May.

When asked who Weisinger was speaking with when making the complaints, Bryce stated:

> Anyone in the room that was working at the time. You know, often these were happening before we opened while we were getting the store ready to be open. You know, while we're doing sink towels, while we're cleaning up our cones and guards or anything. You know, she wouldn't do it in front of Christy Nino, but it would definitely happen very openly.

This testimony does not establish that Hall was aware that other employees shared Weisinger's specific complaint about Nino's breaks.[49]

[49] Tr. 454–456.

In her January 29 statement concerning her conversation with Weisinger on January 25, Thomas stated that, when Weisinger returned to the store on January 21, she "proceeded to talk negatively to one girl who was working and then tell her version of what had happened earlier with employees while on the floor." To begin, the statement is hearsay. Thomas testified at the hearing, but was not questioned about this exhibit and thus did not corroborate the statement or provide any further insight into the alleged conversation between Weisinger and another individual. Even if it was admissible as substantive evidence, the statement, standing alone, does not establish Thomas's knowledge of the protected concerted discussions of other employees concerning Nino's breaks.[50]

Finally, the General Counsel asked Cody Lovins about a factual finding of the Texas Workforce Commission in its denial of Weisinger's application for unemployment benefits. The finding concerned Weisinger's argument with Hall on January 21. It stated:

> [T]he claimant attempted to speak to her manager, Stacy Hall, to inquire about the amount of breaks a coworker was taking. Ms. Hall declined to answer the claimant because the information regarding the coworker was private.

The General Counsel asked Lovins how that information was private. He responded that Weisinger was complaining about another employee taking too many breaks. Then he stated:

> We allow employees to take breaks when they need one. We've never told an employee they can't take breaks. And [Weisinger] tried to stir the pot with other employees, and that's probably why [Hall] told her that.

The General Counsel makes much out of Lovins's "stir the pot" comment, but I find the comment to be a red herring. This line of questioning concerned whether the Respondent believed that the amount of breaks another employee was taking was private information. It did not concern the Respondent's knowledge of Weisinger's conversations with other employees concerning breaks. Lovins provided no further explanation as to how Weisinger was stirring the pot with other employees.[51]

Accordingly, I conclude that the record evidence relied upon by the General Counsel is insufficient to establish the Respondent's knowledge of Weisinger's protected concerted activity. *Ellison Media Co.*, 344 NLRB 1112, 1112 fn. 3, 1123 (2005); *Cardinal Hayes Home for Children*, 315 NLRB 583 (1994).

Assuming arguendo that knowledge had been established, I would conclude that the Respondent did not harbor animus to Weisinger and the other employees' discussions about the

[50] Jt. Exh. 6.

[51] Tr. 208–209.

inability to take breaks. As to their January 21 argument, Hall took exception to Weisinger yelling at her, throwing her mascara down, and telling Hall that Weisinger herself, and not Hall, would decide when she took breaks. Hall did not say anything concerning Weisinger's discussions with other employees about breaks. In Thomas's subsequent communications with Weisinger that day, Thomas questioned Weisinger's fitness to work at Sport Clips during her pregnancy. After Weisinger raised concerns about her unborn child, Thomas told her she could leave. Again, nothing was said about Weisinger's discussions with other employees about breaks. The ensuing discipline on January 25 was not due to Weisinger raising Nino's breaks with Hall.

I do agree with the General Counsel that the Respondent harbored animus towards Weisinger's discussion with her client on January 27. In particular, Cody Lovins, Thomas, and Hall decided to discharge Weisinger, in part, because she disclosed her discipline and the associated conversation with management to the client. The disclosure violated the arguably unlawful instruction she had been given to not discuss the discipline with others. Animus towards this conduct also is established by the timing of the discharge in relation to the conduct; Respondent's shifting explanations for Weisinger's discharge advanced at the hearing; and the inadequate investigation the Respondent conducted, in particular its failure to interview Weisinger, concerning her January 27 conduct. See *Lucky Cab Co.*, 360 NLRB 271, 274 (2014). Nonetheless, this animus finding is irrelevant, given my earlier conclusion that Weisinger's January 27 discussion with the client was unprotected.

Finally, and further assuming arguendo that the General Counsel had sustained the initial *Wright Line* burden, I would conclude the Respondent demonstrated it would have terminated Weisinger even in the absence of her protected conduct. In May 2020, Weisinger was disciplined and demoted from her managerial position after she criticized the performance of a new employee and for speaking inappropriately to another employee on the salon floor. She was counseled that her behavior and conversations needed to be professional. On January 21, Weisinger got into a heated argument with Hall over breaks and yelled at her, resulting in a last-chance agreement. On January 27, Weisinger had a conversation with a client on the salon floor which resulted in the Respondent losing scheduled business from another client. The conduct for which Weisinger was disciplined all is of the same character. The Respondent followed steps in its progressive discipline policy before terminating Weisinger. The conduct for which she was terminated occurred only 2 days after she had received the last-chance agreement. Even absent her discussions with coworkers about breaks, the Respondent would have discharged Weisinger. *Intermet Stevensville*, 350 NLRB 1349, 1356–1358 (2007) (employer's warning and demotion of employee was lawful where employee previously was warned about needing to learn to work well with others and treating supervisor in a professional manner well prior to protected activity); *St. Clair Memorial Hospital*, 309 NLRB 738, 741 (1992) (employer's discharge of employee was lawful, where employee had been warned several times in the past about poor attitude and then was insubordinate).

Because the General Counsel failed to meet the initial evidentiary burden under *Wright Line*, the complaint is dismissed.

CONCLUSIONS OF LAW

1. The Respondent, Bonanza Ventures LLC d/b/a Sport Clips, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent's discharge of Megan Weisinger did not violate Section 8(a)(1).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[52]

ORDER

The complaint is dismissed.

Dated, Washington, D.C., May 20, 2022.

Charles J. Muhl
Administrative Law Judge

[52] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.